IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR

ORDER

Sh. Jagdish Sharma **Vs.** Union of India & Ors.

S.B. Civil Writ Petition No. 4493/2007

Date of order :: July 20, 2007

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. Naresh Gupta for the petitioner
Mr. R.B. Mathur for the respondents

REPORTABLE

BY THE COURT:

1. Heard learned counsel for the parties.

2. This writ petition has been filed by the petitioner claiming the following reliefs :-

(i) quash the impugned attachment order dated 17.04.2007 (Annexure-11) and further direct the

respondents to release all the 3 FDRs of Rs. 1,00,00,000/- lying with Jaipur Thar Gramin Bank, at Bhankrota, Distt. Jaipur; and

(ii) direct the respondents to exclude the period during which the FDRs of the petitioner remained attached in computing the period of two years as prescribed in section 54B of the Act for the purchase of agricultural land; and

(iii) quash and set-aside the impugned order dated 01.05.2007 (Annexure-12) followed by order dated 16.05.2007 (Annexure-13) passed by the respondent No. 3 & 2; and kindly direct the respondent No. 3 to keep the recovery proceedings in abeyance till the disposal of Ist appeal pending before the Commissioner of Income Tax (Appeals)-III, Jaipur; and

(iv) The costs of the writ petition may also be awarded to meet the ends of justice.

(v) Any other order/relief as your Lordships may deem fit and proper in the facts and circumstances of the case may kindly be passed in favour of the petitioner, in the interest of justice, equity and good conscience.

3. The petitioner has come before this court in extraordinary jurisdiction under Article 226 of the Constitution of India claiming the limited relief that the respondents Income Tax authorities had erred in making a provisional attachment of 3 FDRs of Rs. 1 crore of the petitioner vide the impugned attachment order dated 17.04.2007 passed under Section 281-B of the Income Tax Act, 1961 (for brevity, hereinafter to be

referred as 'the Act'), though the demand on the capital gains on the sale of the agricultural land made by the petitioner assessee was only to the extent of Rs. 30,97,103/- vide the assessment order dated 16.02.2007.

4. Learned counsel for the assessee submits that on account of attachment of the FDRs of excessive amount of Rs. 1 crore, the petitioner-assessee was deprived of his opportunity to complete the transaction of fresh purchase of agricultural land within two years from the date of transfer of the agricultural land in question, which resulted in capital gains and thus, he could not avail the benefit of exemption from capital gains in view of Section 54-B of the Act. He submits that though he agreed to purchase the agricultural land out of such capital gains arising to him on 15.05.2006 as against the previous agricultural lands sold on 16.04.2005 within one year and also took possession of the new agricultural land purchased by him on 02.09.2006 within stipulated period of two years, but the fresh sale-deed could not be got executed by him in his favour due to non-payment of the remaining part of the sale consideration in view of the funds

being blocked by way of attachment by the Revenue authorities illegally and thus, this resulted in denial of exemption to him due to illegal action of respondents, by the impugned assessment order Annexure-8 dated 16.02.2007. Though he submits, the assessee's first appeal before the appellate authority, namely, CIT (Appeals) is pending against the said assessment order, the learned Commissioner of Income Tax-III, Jaipur vide his order dated 16.05.2007 (Annexure-13) has directed the petitioner to pay at least 50% of the demand till disposal of the appeal by the CIT (Appeals) and the recovery of the balance demand has been kept in abeyance. Learned counsel for the petitioner, therefore, submits that 3 FDRs of Rs. 1 crore under attachment by the Revenue authorities does not serve any purpose and on the contrary, it has seriously prejudiced the legal rights of the petitioner-assessee. He fairly submits that the assessee would pay such 50% of the demand, namely, Rs. 15,48,550/-, which may be realised out of the 3 FDRs in question and the balance amount may be released to him. He further submits that the period of two years for purchase of another agricultural land should be treated as extended so that the assessee be held

entitled to exemption under Section 54-B of the Act.

5. Learned counsel for the Revenue, Mr. R.B. Mathur, submits that interest of Revenue should be safeguarded as the petitioner is an agriculturist and it may be difficult to recover the entire demand from the petitioner-assessee in case he does not succeed in his appeal. He further submits that the question regarding exemption from capital gains is involved in the appeal, which is pending before the learned Commissioner of Income Tax (Appeals), therefore, this court may not decide the said issue.

6. Learned counsel for the petitioner Mr. Naresh Gupta has relied upon the Division Bench Judgment of Gauhati High Court in *CIT Vs. Rajesh Kumar Jalan* reported in (2006) 206 CTR (Gau) 361 : (2006) 286 ITR 274 (Gau) : (2006) 157 TAXMAN 398 (Gau), wherein the Gauhati High Court held referring to Section 53-A of the Transfer of Property Act that if the possession of the property is taken by the purchaser within the stipulated period of two years, the assessee would be entitled to benefit of exemption from capital gains under Section 54(2) of the Act, which is akin to

Section 54-B of the same Act. The court held as under, extracting and approving ITAT's order in appeal:-

> *"Extract of ITAT order:-*
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> *11. Therefore, for the purpose of transfer the possession of the flat in part performance of the contract under s. 53A of the Transfer of Property Act is essential. Further, under the provision of s. 54(1) of the Act, it is stipulated that a person is entitled to take the benefit if the purchase has been made within the stipulated period of one year before or two years after the date on which the transfer took place. In the case before us, the assessee has undisputedly entered into agreement for purchase of the flat and taken possession within one year from the date of sale of the old residential house. Therefore, we agree with the learned Authorised Representative of the assessee that the assessee has complied with the requirements as laid down in s. 54(1) of the Act by purchasing the flat at a cost of Rs. 30 lakhs as against the capital gain of Rs. 29,73,048. Therefore, we agree with the learned Authrised Representative of the assessee that there has been no necessity to comply with the conditions for availing of the benefit from tax of the capital gain, as laid down under s. 54(2) of the Act, i.e., to deposit the unpaid amount in a separate bank account under the capital gain account scheme. We are of the view that the assessee had already appropriated the entire capital gain for purchase of the new asset within the stipulated time. In this regard, we find support from the decision of the Kerala High Court in the case of ITO vs. K.C. Gopalan (2000) 162 CTR (Ker) 566 wherein it was held*

that the assessee is entitled to exemption under s. 54 even though for the construction of the new house, the amount that was received by way of sale of his old property as such was not utilised. It was held by the Kerala High Court that no provision is made by the statute that the assessee should utilise the amount which he obtained by way of sale consideration for the purpose of meeting the cost of the new asset. It was held that s. 54 only provides that the assessee has to purchase a house property for the purpose of his own residence within a period of one year before or after the date on which the transfer of his property took place or he should have constructed a house property within a period of two years after the date of transfer. It was further held that entitlement of exemption under s. 54 relates to the cost of acquisition of a new estate in the nature of a house property for the purpose of his own residence within the specified period.

12. In the case before us, the ratio laid down by the Hon'ble Kerala High Court squarely applied to the case before us as the assessee had acquired the house at a cost more than the capital gains within the specified period.

13. Therefore, we hold that the assessee is entitled for the exemption under s. 54 of the Act for the entire long-term capital gain of Rs. 29,73,048. Accordingly, we allow the ground of appeal of the assessee and reject the ground of appeal of the Department."

"<u>Gauhati High Court:-</u>

6. From a plain reading of sub-s. (2) of s. 54

of the IT Act, 1961, it is clear that only s. 139 of the IT Act, 1961, is mentioned in s. 54(2) in the context that the unutilised portion of the capital gain on the sale of property used for residence should be deposited before the date of furnishing the return of the income-tax under s. 139 of the IT Act. Sec. 139 of the IT Act, 1961, cannot be meant only as s. 139(1) but it means all sub-sections of s. 139 of the IT Act, 1961. Under sub-s. (4) of s. 139 of the IT Act any person who has not furnished a return within the time allowed to him under sub-s. (1) of s. 142 may furnish the return for any previous year at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment whichever is earlier. Such being the situation, it is the case of the respondent/assessee that the respondent/assessee could fulfil the requirement under s. 54 of the IT Act for exemption of the capital gain from being charged to income-tax on the sale of property used for residence upto 30th March, 1998, inasmuch as the return of income-tax for the asst. yr. 1997-98 could be furnished before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment whichever is earlier under sub-s. (4) of s. 139 of the IT Act, 1961.

9. For the reasons discussed above, we answer the question formulated in the present case in positive. Accordingly the order of the learned Tribunal, Gauhati Bench, Gauhati, dt. 18th April, 2001, passed in ITA No. 328/Gau/1999 and ITA No. 49/Gau/2000 is not interfered with and the appeal is dismissed."

7. Section 54-B of the Act and Section 281-B of the Act are reproduced hereunder for ready reference :-

> *"[Capital gain on transfer of land used for agricultural purposes not to be charged in certain cases.*
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> ***54B.*** *[(1)] [Subject to the provisions of sub-section (2), where the capital gain arises] from the transfer of a capital asset being land which, in the two years immediately preceding the date on which the transfer took place, was being used by the assessee or a parent of his for agricultural purposes [(hereinafter referred to as the original asset)], and the assessee has, within a period of two years after that date, purchased any other land for being used for agricultural purposes, then, instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say,-*
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> *(i) if the amount of the capital gain is greater than the cost of the land so purchased (hereinafter referred to as the new asset), the difference between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase, the cost shall be nil; or*
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> *(ii) if the amount of the capital gain is equal to*

or less than the cost of the new asset, the capital gain shall not be charged under section 45; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase, the cost shall be reduced, by the amount of the capital gain.]

[(2) The amount of the capital gain which is not utilised by the assessee for the purchase of the new asset before the date of furnishing the return of income under Section 139, shall be deposited by him before furnishing such return [such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of section 139] in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit; and, for the purposes of sub-section (1), the amount, if any, already utilised by the assessee for the purchase of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset:

Provided that if the amount deposited under this sub-section is not utilised wholly or partly for the purchase of the new asset within the period specified in sub-section (1), then,-

(i) the amount not so utilised shall be charged under section 45 as the income of the previous year in which the period of two years from the date of the transfer of the original asset expires; and

(ii) the assessee shall be entitled to withdraw such amount in accordance with the scheme aforesaid."

*"[**Provisional attachment to protect revenue in certain cases.***

281B. *(1) Where, during the pendency of any proceeding for the assessment of any income or for the assessment or reassessment of any income which has escaped assessment, the [Assessing] Officer is of the opinion that for the purpose of protecting the interests of the revenue it is necessary so to do, he may, with the previous approval of the [Chief Commissioner, Commissioner, Director General or Director], by order in writing, attach provisionally any property belonging to the assessee in the manner provided in the Second Schedule.*

[Explanation.- For the purposes of this sub-section, proceedings under sub-section (5) of section 132 shall be deemed to be proceedings for the assessment of any income or for the assessment or reassessment of any income which has escaped assessment.]

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the order made under sub-section (1):

Provided *that the [Chief Commissioner, Commissioner, Director General or Director] may, for reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he thinks fit, so, however, that the total period of extension shall not in any case exceed two years:*

[Provided further that where an application for settlement under section 245C is made, the period commencing from the date on which such application is made and ending with the date on which an order under sub-section (1) of section 245D is made shall be excluded from the period specified in the preceding proviso.]

8. Though the judgment of the Gauhati High Court appears to be supporting the case of the petitioner, however, since the issue relating to exemption from capital gains is pending before the appellate authority, this court would not express any final opinion on that issue at this stage and the appellate authority should consider the said issue in accordance with law on the basis of material placed before him.

9. That as far as the attachment of 3 FDRs of Rs. 1 crore is concerned, there is not much dispute between both the sides that if the payment as directed by the learned Commissioner of Income Tax-III, Jaipur is made immediately upon the release of these FDRs and the interest of Revenue to the extent of balance amount is adequately safeguarded, the balance amount over and above the disputed demand of Rs. 30,97,103/- can be released

in favour of the petitioner-assessee.

10. In view of the facts and circumstances of the case, this writ petition is disposed of with the direction to the respondents to release the 3 FDRs from the attachment, provided the petitioner first submits an undertaking and immediately upon release of the FDRs pays the 50% of the disputed demand, i.e. Rs. 15,48,550/- as directed by CIT in his order dated 16.05.2007 within a week of the release of the FDRs, subject to decision of his appeal by the learned CIT (Appeals) and also furnishes a solvent security in the form of bank guarantee to the extent of the remaining amount of 50% to safeguard the interest of the Revenue. The provisional attachment order of 3 FDRs (Annex.11) dated 17.04.2007 is quashed and it is directed that the FDRs in question may be released within a period of 15 days from today. It is expected that the appeal pending before the learned CIT (Appeals) would be expeditiously decided within a period of three months from today.

11. With these observations, this writ petition is disposed of

with no order as to costs.

(Dr.VINEET KOTHARI),J.

Pramod
Item No. 15